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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Increase Revenue Requirements for Electric and Gas Service and to Increase Rates and Charges for Gas Service Effective on January 1, 2003.	Application 02-11-017 (Filed November 8, 2002)
Investigation on the Commission's own Motion into the Rates, Operations, Practices, Service and Facilities of Pacific Gas and Electric Company.	Investigation 03-01-012 (Filed January 16, 2003)
Application of Pacific Gas and Electric Company Pursuant to Resolution E-3770 for Reimbursement of Costs Associated with Delay in Implementation of PG&E's New Customer Information System Caused by the 2002 20/20 Customer Rebate System.	Application 02-09-005 (Filed September 6, 2002)

OPENING BRIEF
OF THE CONSUMER PROTECTION AND SAFETY DIVISION
REGARDING PG&E'S BILLING AND COLLECTION PRACTICES

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OPENING BRIEF OF THE CONSUMER PROTECTION AND SAFETY DIVISION REGARDING PG&E'S BILLING AND COLLECTION PRACTICES

I. INTRODUCTION

Pacific Gas and Electric Company's (PG&E) Tariff Rule 17.1(B)(2)(a) requires PG&E to limit its backbilling to three months for residential customers, and three years for nonresidential customers, when the backbilling is caused by "billing error" on the part of the utility[1]. "Billing error" is defined as "the incorrect billing of an account due to an error by PG&E, the energy service provider (ESP), or its agents, or the Customer which results in incorrect charges to the Customer." (Rule 17.1(A)) In Resolution G-3372, as modified by D.05-09-046, the Commission found that failure to send a bill to the customer, and sending estimated bills to a customer, falls under the definition of "billing error". PG&E argued in its application for rehearing of Resolution G-3372 that a "billing error" occurs only if the utility actually issued a bill and that bill was subsequently found to contain an error, and that the Commission's "newly adopted" definition is not consistent with past policy. The Commission rejected PG&E's application for rehearing, stating that the Commission's interpretation of Rule 17.1(B)(2)(a) is "consistent with existing CPUC policy and requirements as set forth in Decision 86-06-035 and with existing PG&E tariffs". (D.05-09-046, p.23.)

As described in Assigned Commissioner's Scoping Memo, this case can be summarized as presenting three separate but related legal issues. Those are:

- Did PG&E's conduct with regards to backbilling violate Tariff Rule 17.1(B)(2)(a)?
- Did PG&E improperly backbill customers as a result of the tariff violation, and should PG&E refund the money it improperly collected from customers?
- Should PG&E be fined because of its incorrect interpretation of its tariffs, which resulted in substantial economic harm to customers?

[1] PG&E's Tariff Rule 17.1(B)(2) reads:

a. Residential Service. If a residential service is found to have been undercharged due to a billing error, PG&E may bill the Customer for the amount of the undercharge for a period of three months. However, if it is known that the period of billing error was less than three months, the undercharge will be calculated for only those months during which the billing error occurred.

b. Nonresidential service. If a nonresidential service is found to have been undercharged due to a billing error, PG&E may bill the Customer for the amount of the undercharge for a period of three years. However, if it is known that the period of billing error was less than three years, the undercharge will be calculated for only those months during which the billing error occurred."

The evidence demonstrates that PG&E backbilled its customers as a result of billing error (failure to issue bills, issuing estimated bills), in violation of the time limits in Tariff Rule 17.1(B)(2)(a). PG&E backbilled many of its customers causing substantial economic harm. (Both the Consumer Protection and Safety Division (CPSD) and PG&E have spent many months reviewing the data, and have revised the data several times, in order to ensure that the amount that was improperly backbilled has been calculated correctly.)

It is undisputed that PG&E's interpretation of Rule 17.1(B)(2)(a) was incorrect[2]; however, PG&E disputes whether a fine is appropriate, since PG&E argues that its interpretation was reasonably based on the tariff language, and that Commission staff (in the past) agreed with PG&E's mis-interpretation. CPSD does not dispute that some Commission staff issued "closure letters" to customers that essentially accepted PG&E's position. However, PG&E's interpretation was not arrived at in a thoughtful manner, and PG&E ignored hundreds of customer complaints and pursued a policy that resulted in substantial customer harm. The plain language of the tariff was clear – PG&E should not have backbilled customers as a result of its own "billing error". Moreover, the facts demonstrate that PG&E was not aware of the Commission staffs' endorsement at the time it drafted its position, thus whether or not staff members agreed with PG&E is irrelevant[3]. PG&E's management were solely responsible for the origination of the misinterpretation – which justifies a fine in order to deter future misinterpretations.

The remedy for the systematic tariff violation is clear – since PG&E collected money from customers that it was not entitled to, PG&E should provide restitution

[2] PG&E argues that its interpretation was "reasonable", but nowhere in its testimony does PG&E argue that it was the correct one.

[3] In D.05-09-046, the Commission made it clear that PG&E cannot reasonably rely on the agreement of CAB consumer representatives, stating: "We, and not the staff, establish the regulatory law that the utilities must follow. The CAB letters do not constitute grounds for finding the Resolution to be unlawful or erroneous, nor does PG&E offer legal authority in support of its argument on this point. PG&E knows very well that the informal opinions of the Staff cannot bind the Commission. PG&E's discussion of CAB letters does not identify error in the Resolution."

(refunds plus interest) to those customers. PG&E should not be allowed to keep money that was improperly collected from customers. Furthermore, in order to deter future tariff violations, an additional financial penalty is justified. Tariffs have always been interpreted strictly (either for or against PG&E), and the Commission has demonstrated in the past that it considers tariff violations to be serious, and thus should be dealt with accordingly.

II. SUMMARY OF CPSD'S RECOMMENDATIONS

CPSD's recommendations[4] are as follows. PG&E should be ordered to:

- Return all overcollections as a result of a backbill after a period of no bill - $35,362,957 (Exhibit 10[5]), plus interest.
- Return all overcollections as a result of estimated bills without explanations over a period of greater than 3 months - $6,549,108.36 (Ex.15), plus interest.
- Return all residential (and non-residential) customer deposits required after presentation of an inappropriate "long bill[6]" - $285,893 (non-res, $2,896), plus interest. (Table VI-4, Ex.3.)
- Return all customer deposits required after termination for failure to pay an inappropriate estimated bill - $3,882.33. (Table X-4, Ex.3.)
- Return all reconnect fees charged after a termination for non-payment of an inappropriate backbill - $5,500 (non-res, $120), plus interest. (Ex.3, p.20.)
- Modify Tariff Rule 9 to use a more streamlined approach in the calculation of the customer's Average Daily Usage (ADU) to determine usage in an estimated bill.

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[4] The time period examined by CPSD in this case is 2000 to 2005.

[5] All exhibit references are to the exhibits accepted into evidence during the evidentiary hearings.

[6] PG&E uses the term "long bill", defined as residential customer deposits required to be paid after presentation of bill in excess of 95 days in violation of Rule 17.1. (Ex.3, p.26.)

- Pay a monetary fine of $6.75 million, calculated by multiplying the number of days that PG&E maintained a policy in violation of the tariff by $1,000 per day, pursuant to Public Utilities (PU) Code Sections 2107 and 2108.

III. PROCEDURAL HISTORY

The Commission's policy regarding backbilling dates back to 1986. In *Re: Retroactive Billing by Gas and Electric Utilities to Correct Alleged Meter Underbillings Due to Meter Error and Meter Fraud* ("*Retroactive Billing Decision*") [D.86-06-035] (1986) 21 Cal P.U.C.2d 270, the Commission established for gas and electric utilities a three-month limitation on retroactive billing of residential customers for billing and meter errors. (*Id*. at p. 278.)[7] It also directed utilities to submit tariffs in conformance with the decision. (*Ibid.*)

The Commission applied the *Retroactive Billing Decision's* policy on retroactive billing of residential customers in a 1994 complaint case against PG&E. (*Geraldine Skinner v. Pacific Gas and Electric Co.* [D.94-07-050] (1994) 55 Cal.P.U.C.2d 408.). In *Skinner,* PG&E had failed to bill a customer for actual electric usage for 12 months. PG&E billed the customer a minimum $5 charge for electricity and billed for gas usage. (*Id.* at p. 409.) The Commission explained, "[t]hus, because of a failure of defendant's account coding and methods to verify usage, the underbilling continued for 12 months." (*Id.* at p. 410.) Based on D.86-06-035 and Rule 17.1(B)(2)(a), the Commission found that PG&E could only bill the Skinners for estimated usage during February, March, and April of 1993. PG&E had already issued a bill for 12 months for $ 2,436.29 for electric usage. PG&E had not collected the amount – thus, in effect PG&E had to credit the Skinner's account for 9 months of usage.

[7] The purpose of this backbilling policy is to protect residential customers from excessive retroactive billing when billing problems are due to conduct or lack of action within the utility's control. (See, e.g., *Geraldine Skinner v. Pacific Gas and Electric Co.* ("*Skinner*") [D.94-07-050] (1994) 55 Cal.P.U.C.2d 408, 410-411.)

The issue of what constituted a “billing error” for purposes of PG&E’s Tariff Rule 17.1 became a topic of informal discussions between PG&E, individual complaining customers, and Commission staff in 2004. Informally, Commission staff and PG&E had been addressing customer complaints about PG&E’s backbilling for failures to issue bills and estimated bills. (Ex.34, 2-6.)

On October 22nd, 2004, the Commission’s Executive Director Steve Larson requested that PG&E stop collecting from residential customers overdue amounts that dated back more than 90 days and referred to Rule 17.1. (Ex.4, Att.1.) The Executive Director stated that if PG&E is experiencing circumstances requiring it to estimate so many bills each month, it should proactively address the situation. (Ex. 4, Att. 1.)

PG&E filed Advice Letter 2581-G/2568-E (dated October 15, 2004) (Advice Letter) in which it proposed to expand Rule 17.1 to add, among other changes[8], the following language:

> “Billing error shall also include failure to issue a gas, electric or combined commodity bill, actual or estimated, in a timely manner in accordance with Rule 9.A.”

The Advice Letter said the changes to Rule 17.1, “will result in residential customers having a three-month limitation placed on their back bill exposure for services provided by PG&E in most instances.” (Advice Letter, p. 2.) Further, it proposed that the modified language be made effective as of October 13, 2004. (Advice Letter, p. 2.)

The Utility Reform Network (“TURN”) filed a protest to the Advice Letter on November 4, 2004, urging the Commission to reject the Advice Letter and initiate a formal investigation into PG&E’s billing and collection practices. Because the Advice Letter proposed to establish October 13, 2004 as the effective date for the modified definition, TURN characterized the Advice Letter as “a transparent effort by the utility to stem its exposure for practices that are inconsistent with the rules as they exist today.”

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[8] PG&E’s Advice Letter also proposed to modify gas Rule 17.2, section A.5 and electric Rule 17.2, section A.6 regarding adjustment for unauthorized use, and to add Rule 17.3 to cover situations that were not covered in Rules 17.1 or 17.2.

(TURN's Protest to PG&E Advice Letter 2581-G/2568-E (TURN Protest), p. 2.)[9] TURN argued that the pre-existing Rule 17.1 already encompassed failure to "produce an accurate and timely bill" in its definition of billing error. (TURN Protest, p. 3.) TURN also advocated that the Commission find that extended reliance on estimated bills constitutes a billing error under the pre-existing Rule 17.1, and recommended including that statement in any modification to Rule 17.1. (TURN Protest, p. 4.)

On November 9, 2004, TURN also filed a motion in PG&E's 2003 general rate case (GRC), Application (A.) 02-11-017, seeking an investigation into PG&E's billing and collection practices. (Ex.4, Att.2.) TURN indicated that an ever-growing number of PG&E customers had contacted TURN with concerns regarding PG&E's billing and collection practices. (Ex.3, p.7.) The motion was granted, consolidating the investigation with Investigation (I.) 03-01-012, a companion investigation with the GRC. (Ex.4, Att.6; *Assigned Commissioner's Ruling Granting the Utility Reform Network Motion for an Investigation into Pacific Gas and Electric Company's Billing and Collection Practices* filed February 25, 2005, pp. 1-2.)

The Commission issued Resolution G-3372 (Resolution), dated January 13, 2005, in response to the PG&E Advice Letter. (Ex.4, Att.3.) The Resolution granted some proposals recommended by PG&E and by TURN in its protest to the Advice Letter, modified some and denied others. In ruling on the Advice Letter proposals, the Resolution interpreted the existing tariff and adopted clarifying language based on a proper interpretation of the tariffs. (Ex.4, Att.3, p. 15; see also, Ex.4, Att.8 (D.05-09-046), Appendix A: Modified Resolution G-3372, p. 14.)

Specifically, the Resolution approved and modified tariff language regarding the definition of "billing error" and the use of PG&E service without compensation. The Resolution specified as billing error, failure to issue bills and estimated bills and failure to issue a bill or estimating a bill due to changes to a billing system. (Ex.4,

[9] See TURN's Protest to the Advice Letter, p. 19.)

Att.3, pp. 23-24; see also, D.05-09-046, Appendix A: Modified Resolution G-3372, p. 22 [Findings of Fact No. (FOF) 3, 4 & 6,].)

The Resolution adopted other clarifying language to articulate what it referred to as the proper interpretation of existing tariffs. (Ex.4, Att.3; Resolution G-3372, p. 15; see also, D.05-09-046, Appendix A: Modified Resolution G-3372, p. 14.) The Commission observed that the outcome is consistent with, "existing CPUC policy, tariffs, and requirements, including [the requirements of D.86-06-035]." (See, e.g., Ex.4, Att.3, p. 2; see also, D.05-09-046, Appendix A: Modified Resolution G-3372, pp. 9 and 24.)

PG&E filed an Application for Rehearing of the Resolution. In its rehearing application, PG&E claimed: (1) "the Commission errs by finding that its "newly adopted" definition of billing error is consistent with existing CPUC policy, tariffs and requirements, including the requirements of D.86-06-035," (2) "the Resolution's findings also improperly disregard the Commission staff's express prior guidance in interpreting those tariffs," and (3) "by finding that its newly-adopted definition of billing error is consistent with the existing tariff, Resolution G-3372 could be construed to imply retroactive effect to the Commission's new definition."

TURN filed a Response to the rehearing application urging the Commission to deny PG&E's application, "because the definition of 'billing error' in Resolution G-3372 is wholly consistent with Commission policy, tariffs and requirements and because PG&E's due process and retroactivity concerns are unfounded." (TURN Rehearing Response, p. 2.)

On February 4, 2005, PG&E filed a report on "Delayed and Estimated Bills From 2000 through 2004" (Ex.4, Att.5), in response to a provision in Resolution G-3372 ordering PG&E to explain the reasons for the large number of delayed and estimated bills over the past five years and a plan for reducing the number of these bills.

On February 25, 2005, the Assigned Commissioner's Ruling set out the issues to be addressed in a separate proceeding, setting out specific issues to be addressed in the investigation including, but not limited to: whether PG&E has made changes to its billing practices since 2002 that would affect the number of estimated or delayed bills it issues; the effects of implementing the new billing system – CorDaptix; PG&E's collection practices since 2002; PG&E's deposit requirement practices since 2002; the nexus of service terminated due to non-payment and/or additional deposits with estimated or delayed bills since 2002; and whether any of the above warrants the imposition of a fine an/or reparations to PG&E customers.

On March 22, 2005, ALJ Halligan convened a prehearing conference and subsequently issued a Scoping Memo and Ruling Establishing Scope, Schedule, and Procedures for this case. (Ex.4, Att.7.)

On September 22, 2005, the Commission issued Decision 05-09-046 denying PG&E's Application for Rehearing and modifying Resolution G-3372. (Ex.4, Att.8.) In D.05-09-046, the Commission rejected PG&E's narrow interpretation of billing error and its claims regarding the significance of staff letters. The decision adopted clarifying modifications to Resolution G-3372, as explained in detail therein, and issued Modified Resolution G-3372 in its completed form, as Appendix A to D.05-09-046.

On October 28, 2005, PG&E filed a petition for writ of review in the Court of Appeals requesting review of G-3372 and D.05-09-046. (Ex.4, Att.10.) The Court of Appeals has not yet ruled on PG&E's petition.

In early 2006, the parties exchanged prepared testimony, and evidentiary hearings were held from May 24 through May 31, 2006.

IV. FACTS

The record developed at the evidentiary hearings demonstrated the following:

There were two general increases in the number of delayed bills over the last five years. (Ex.3, p.36.) Sometime in approximately 1998-99, PG&E implemented a new billing system that caused some customers to receive backbills after not receiving bills for a period of time. (*Ibid.*) PG&E claims the first increase was due to the installation of a new billing engine (as a temporary fix) for its Legacy Customer Information System (LCIS). (Ex.4, Att.5.)

Therefore, in the first year considered by CPSD, there were already a large number of backbills being issued in excess of 3 months. Exhibit 9 shows that in 2000 the number varied between 3,000 and 8,000 per month, for a total of 57,440. (Ex.9.) The number of backbills in 2001 stayed about the same, although it appears they began to drop off in late 2001, for a total of 61,689. (Ex.9.) In 2002, the numbers of backbills decreased dramatically, and stayed low until early 2003. (Ex.9.)

In December 2002, PG&E installed a new customer information system (also referred to as a billing system), called CorDaptix. (Ex.34, 3-1.) PG&E claims that because of CorDaptix, "PG&E experienced a subsequent temporary but modest increase in its estimated and delayed bill numbers." (*Ibid*.)

Exhibit 9, Revised Attachment 18

Revised as of May 2006

Total Residential Delayed Bills Issued > 3 Months							
Month	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**Totals**
January	3,453	5,189	4,756	1,147	11,343	1,419	27,307
February	4,824	4,888	4,034	1,812	20,866	1,017	37,441
March	7,809	7,042	3,402	7,657	11,148	1,339	38,397
April	6,561	6,177	3,051	5,705	5,046	1,134	27,674
May	5,645	7,109	3,335	6,065	3,725		25,879
June	4,443	6,447	3,001	7,192	3,930		25,013
July	4,118	5,750	2,409	6,299	4,595		23,171
August	3,408	4,646	2,199	11,088	5,952		27,293
September	2,936	3,595	2,093	8,976	6,020		23,620
October	3,646	3,848	2,489	6,955	2,376		19,314
November	5,061	3,315	857	6,996	2,202		18,431
December	5,536	3,683	1,471	9,976	1,744		22,410
Totals	**57,440**	**61,689**	**33,097**	**79,868**	**78,947**	**4,909**	**315,950**

Source: PG&E Response Data Request 004-MDK Question #1 Attachments **CPSD_009-01-7** for periods Jan00 – Nov02 (Legacy Period) and **CPSD_009-01-6**
for periods Dec02 to Apr05 (Cordaptix Period).

In mid 2003, the numbers began to rise dramatically, and PG&E's explanation is that it was caused by the implementation of CorDaptix. (See Ex.34, PG&E's Executive Summary and Chapter 3, throughout.) According to PG&E, the number of conversion errors from LCIS to CorDaptix caused the large increase. (Ex.3, p.36.) The conversion errors were data errors that prevented an actual meter read from being used in the billing process. (*Ibid*.) The data errors were discovered through data validation routines that were run post-conversion, creating a list of "To-do's" that were generated by CorDaptix when charges to an account were not properly calculated and the account did not bill. (*Id*., p.37.)

There are three periods of rises in the levels of estimated bills. (Ex.3, p.37[10].) In late 2000 and early 2001, the California energy crisis contributed to the increased level of estimated bills. (*Ibid*.) During this time, many electric service providers (ESPs) returned their customers to bundled service. (*Ibid*.) The ESPs often implemented these switches abruptly en masse, effective as of a date usually set by the ESP. (*Ibid*.) Because these customers were often switched by the ESP without a closing meter read, the customers' last bills as direct access customers had to be estimated. (*Ibid*.) When the customers were returned to bundled service, an added complication arose. (*Ibid*.) The meters that had been installed by the ESPs were often based on remote meter-reading technologies that were incompatible with PG&E's systems. (*Ibid*.) In addition, many of the meters installed for ESP service could not be manually read. (*Ibid*.)

The second spike in estimated bills occurred in February 2003 when PG&E discovered that a programming error resulted in CorDaptix rejecting thousands of valid meter reads in December 2002 and January 2003. (*Ibid*.) PG&E was alerted to this problem following communications from customers asking why they were receiving estimated bills. (*Ibid*.) Senior meter readers investigated and discovered that some customers were issued an estimated bill despite the fact that a valid meter read had been uploaded to CorDaptix. (*Ibid*.) Further internal investigation revealed that a programming error caused CorDaptix to reject valid meter reads. (*Ibid*.) For these months, PG&E's CorDaptix system issued estimated bills to customers. The error was corrected in February 2003. (*Ibid*.)

The third spike in estimated bills occurred in late 2003 and was a result of a combination of factors. (*Ibid*.) In late summer 2003, PG&E discovered that

[10] This background was obtained from PG&E (PG&E Report on Delayed and Estimated Bills, Att.5 of Ex.4) and recounted in CPSD's testimony, Ex.3 at p.37.

CorDaptix was issuing an estimated bill (regardless of the presence of an accurate read) if the customer's meter was marked with the status "Off." (*Ibid*.) In PG&E's report on delayed and estimated bills from 2000 through 2004, dated February 4, 2005, PG&E stated that it reviewed the accounts of those customers with meters marked as "Off" and corrected those found to be in error. (*Ibid*.) In October 2003, the 40,000 customer meters that were incorrectly marked "Off" were corrected. (*Ibid*.) Also, some meter reading routes did not upload properly to CorDaptix during this period. (*Ibid*.) In September 2003, approximately 16,000 meter reads failed to upload due to limitations in a data server. (*Ibid*.) By the end of that month, the data server problem was fixed. (*Ibid*.) During these months, PG&E's CorDaptix system issued estimated bills to customers. (*Ibid*.)

PG&E claims that shortly before the CorDaptix rollout PG&E imposed a moratorium on substantially all of its credit and collection activities. (Ex.34, 8-4.) PG&E claims it chose to incur these costs rather than risk burdening its customers with undue credit and collection activities. (*Ibid*.) TURN contends that PG&E tightened its credit and collection standards at the time it rolled out CorDaptix, and points to a spike in credit and collection activity in late 2003 (for payment arrangements) and 2004 (for deposits). PG&E claims the increase in collection activity reflected only the process of working through the backlog of customers who previously were eligible for collections activity, but who were immunized from such activity during PG&E's moratorium. (Ex.34, 8-4.) The lifting of the moratorium in March 2003 increased the number of service terminations. (*Ibid*.)

V. DISCUSSION

CPSD summarizes the issues presented by this case as follows:

- Did PG&E's conduct with regards to backbilling violate Tariff Rule 17.1(B)(2)(a)? *Yes.*
- Should PG&E refund the money it improperly backbilled and collected from customers? *Yes.*

- Should PG&E be fined because of its incorrect interpretation of its tariffs, which resulted in substantial economic harm to customers? *Yes*.

A. PG&E's Backbilling Practices Violated the Tariff

The tariff consists of three elements – if all are met, then PG&E has violated the tariff. Tariff Rule 17.1(B)(2)(a) states: "If a residential service is found to have been undercharged due to a billing error, PG&E may bill the Customer for the amount of the undercharge for a period of three months."

First, did PG&E commit "billing error"? The Commission has already determined that the failure to send a customer a bill constitutes "billing error" as defined in Rule 17.1, rejecting PG&E's interpretation as unreasonable and illogical. The Commission stated: "Considering a correct or incorrect bill, rather than correct or incorrect billing of an account or correct or incorrect charges to the customer, distorts the analysis of the tariff language. This extremely narrow definition of billing error is neither a reasonable nor a common-sense regulatory interpretation." (D.05-09-046, p.7.)

The Commission has also previously determined that the practice of sending an estimated bill constitutes "billing error. (Resolution G-3372 does not hold PG&E responsible for estimated bills due to circumstances beyond its control.) The Commission stated: "An estimate is incorrect billing of the account resulting in incorrect charges to the customer and must be considered a billing error. Again, PG&E's argument that "billing error" only occurs when a bill has been sent and is later found to be incorrect is not reasonable." (D.05-09-046, p.9.)

The Commission found that PG&E's new billing system was a factor within PG&E's control. (Ex.4, Att.3; Resolution G-3372, p.10.) There is no dispute that failure to send a bill, or sending an estimated bill (when within PG&E's control), because of problems caused by PG&E's billing system, is billing error.

Second, did PG&E's billing error cause undercharges to a customer? There is no question that in many cases customers received backbills for under charges. The record (specifically, Exhibits 9, 10 and 15) reflects a large number of customers who did not receive a correct bill, and the substantial financial harm caused by PG&E's collection of the amount of the undercharges that PG&E subsequently backbilled for.

Third, did PG&E send customers backbills for periods greater than three months (or three years for non-residential)? Again, the answer is yes. CPSD has obtained through discovery data regarding the time period covered by the backbills. (Exhibits 9, 10, and 15, and Exhibit 3, Chapter X, throughout.) While there is some disagreement among the parties as to how to calculate the "period of three months" referred to in Rule 17.1, there is no question that many backbills were sent for time periods greater than three months[11].

All three elements of the tariff have been met. PG&E was in violation of the tariff when it backbilled its customers for periods greater than three months (or three years for non-residential) for undercharges as a result of previously sending no bill or an estimated bill.

1. CPSD's Position is Consistent with *Geraldine Skinner v. PG&E*, D.94-94-07-050

The only case approximately on point is the *Skinner* case. The *Skinner* case involved a single complainant, and did not contain an exhaustive analysis of the issues. It addressed the issue of whether and how much PG&E can bill a customer for actual usage after a period of billing error resulted in undercharges. (It did not address the issue of what to do if PG&E violated the tariff by collecting the improper overcharges.)

It is clear that the Commission in *Skinner* looked at whether there was "billing error" and found that there was, "because of a failure of defendant's account coding and methods to verify usage." (*Id.* at p. 410.) The Skinners had requested to be become "plastic card" customers, designed for customers with hard to read meters. The Skinners received a plastic card on which they were supposed to record their monthly electric usage, and the plastic card was to be placed in the window. PG&E failed to code the

[11] The calculation of the three month time limit is discussed in detail below.

Skinner's account as a plastic card account, and therefore PG&E's meter reader did not obtain actual meter reads because he did not know to look for the plastic card to obtain a reading. PG&E sent a $5 electric bill to the Skinners each month, and then presented the Skinners with a backbill for $2,436.29 for electric usage, covering a period of 12 months.

The Commission's analysis of the *Skinner* case supports CPSD's analysis; first, the Commission found that PG&E committed billing error by not correctly coding the Skinners account as a "plastic card" account; second, PG&E sent the Skinners a large backbill for undercharges as a result of the failure to send an accurate bill; and third, PG&E was not allowed to bill for a period greater than three months. Thus, the Commission's finding in *Skinner* provided guidance about whether and for how long PG&E can permissibly backbill for undercharges.

However, a key difference is that PG&E *did not collect the undercharges* from the Skinners[12]. The Skinners never paid the entire $2,436.29 backbill, thus no refund was owed. In the present case, the customer accounts at issue are those that PG&E backbilled improperly and nevertheless collected the money. Had PG&E complied with Rule 17.1, it would not have collected the undercharges going back more than three months (a result which would have been consistent with *Skinner*). Instead, PG&E typically sent customers to collections, shut-off some customers for non-payment, threatened customers, and forced customers to face termination or to accept harsh payment plans. (Ex.5, pp.6-10.) We cannot say what the Commission would have done in 1994 had PG&E threatened the Skinners and sent them to collections and ultimately either collected the undercharges or terminated the Skinners for non-payment. However, after *Skinner*, there should have been no question to PG&E that its interpretation was incorrect, and that it could not bill for the full amount if the undercharges were caused by PG&E's billing error.

[12] CPSD does not intend to acknowledge that there was no tariff violation in the *Skinner* case. The decision did not specifically find that PG&E had violated the tariff; however, it is reasonable to conclude that the act of sending a backbill for a period of greater than three months, by itself, constitutes a tariff violation, irrespective of whether the money was actually collected.

PG&E argues that *Skinner* merely stands for the proposition that PG&E was not allowed to backbill following an *incorrect* bill – that it does not speak to whether PG&E can issue backbills where no bill was ever sent, or an estimated bill was sent. (Ex.34, 3-17.) However, such a narrow reading is not reasonable in light of the factual circumstances surrounding the "plastic card" program, and PG&E's failure to code the account correctly and to issue either a correct bill or an estimated bill. Nor can the $5 bill for electric usage reasonably be characterized as merely an "incorrect bill" which did not put PG&E on notice that failure to bill or sending estimated bills was not "billing error." PG&E reasonably should have been on notice, after *Skinner*, that the Commission intended that PG&E should be prevented from collecting undercharges for billing error, even if that meant that the customer did not pay for several months of actual usage. The Commission gave no indication in the *Skinner* decision that "billing error" would have the narrow meaning given to it by PG&E.

If PG&E's interpretation is adopted, CPSD questions the purpose of the Rule 17.1(B)(2)(a), and whether it is being undermined. The Commission once stated: "We wonder what purpose the code would serve if it required a utility to include its rates and charges in tariffs but relieved the utilities from complying with those tariffs." (*TURN v. Pacific Bell*, D.93-05-062, 49 CPUC 2d 299, 1993 Cal. PUC LEXIS 394, p.16.)

2. PG&E Has Withdrawn Its Defense Of "No Harm" To Any Customers

PG&E raises the defense that no customers suffered "economic harm", and therefore no refunds are necessary. (Ex.34, 2-4.) Essentially, PG&E withdrew this defense in its opening statement in the hearings, stating: "But if PG&E's testimony, in particular, the assertion that few if any customers who are (sic) harmed, was read or understood to mean that PG&E does not acknowledge that at least some customers were likely harmed, that testimony was an overstatement." (Rptrs. Transcript, 4644:18-23.) However, PG&E "stands by its belief that the great majority of these customers were not" harmed. (4644:26-28.)

It is not clear whether PG&E considers collection of money in violation of the tariff to constitute "economic harm" without some additional showing that the customer suffered a "financial hardship"[13]. CPSD believes that financial harm occurs when the customer is overcharged, regardless of any additional suffering by the customer.

CPSD considers "economic harm" to be more broad – for example, if customers were charged an amount that they did not owe and did not have to pay, that fact alone constitutes financial harm, without additional evidence that the customer could not afford to pay rent, buy food, etc. or that the customer's electricity was shut-off for non-payment.

It would follow from the plain language of the tariff that PG&E must present a backbill for overcharges to be considered in violation of the tariff, and that no finding of "financial harm" is contemplated. Moreover, collection of "overcharges" itself demonstrates harm, regardless of whether additional suffering can be proven.

In any event, CPSD presented a broad sample of statements from consumers that demonstrate how and why the threat of termination for non-payment caused stress and hardship, and how the customers struggled financially to pay these amounts. (Ex.5, pp.6-10.) In addition to the sample of complaints provided by CPSD, common sense supports the finding that (PG&E now concedes) some customers suffered financial hardship because of the large backbills.

3. Mental State Evidence Not Relevant

Nothing in the Public Utilities Code mandates that CPSD must show that PG&E had an "intent" to violate its tariffs. PG&E, while not specifically stating that PG&E's mental state is relevant, nevertheless spends a good deal of time describing PG&E's tariff interpretation as "entirely reasonable", and therefore PG&E concludes that "reaching

[13] PG&E's witness stated: "I think what we've acknowledged is certainly that some customers were harmed. We just don't have a basis for knowing that all of them were harmed. In fact, I -- I would -- I believe that, for any customers, although it may be a hardship, it may be difficult to pay a large bill, that it doesn't result in economic harm; it simply results in those customers having to devote money to payment of a bill that they might have spent elsewhere." (Rptrs. Transcript, 4937:11-19.)

back to the past to award refunds" would not serve the Commission's goals. (Ex.34, 2-9.)

The reasonableness of PG&E's conduct is irrelevant to a finding that PG&E violated the tariff, because tariff violations (such as Rule 17.1) contain no mental state element. In other words, it does not matter what PG&E believed at the time. CPSD believes that the evidence demonstrates that PG&E clearly erred in its interpretation, and that this belief (if actually held) was maintained in the face of clear language to the contrary in the rule, and also was clearly inconsistent with *Skinner v. PG&E*. In any event, no matter what PG&E believed, this would not bar the Commission from finding that a tariff violation occurred.

The Commission considered the "mental state element" in the *CTS* decision, D.07-05-089, finding that: "Public welfare offenses similarly do not require proof of a mental state element. The basis for omitting the mental state element in certain public welfare offenses was recently restated by a California Appellate Court:

> "We first observe that the licensing regulations in this case give rise to 'strict liability' upon breach. The rationale for strict liability offenses was explained by the Supreme Court in *In re Marley* . . . as follows: 'There are many acts that are so destructive of the social order, or where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant.'
>
> ". . . Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. These offenses usually involve light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement." (*People* v. *Rouse*, 202 Cal. App. 3d Supp. 6,

> 10, 249 Cal. Rptr. 281, 283 (1988)(citations omitted).) (CTS, D.97-05-089.)

The *CTS* decision found that violations of PU Code Section 2889.5 did not require a showing a specific intent, stating:

> The *Rouse* analysis is applicable to violations of PU Code Section 2889.5. Long distance carriers are subject to a comprehensive system of regulation. The damage to reputation from failure to comply with this regulation is not equivalent to a criminal conviction. Proving violations of this statute would be virtually impossible if the Commission had to show criminal intent. The legislative purpose in adopting this statute is protection of the public, as with regulation of taxicabs, food sales, and nursing homes. For this reason, the Commission need not add a mental state element to PU Code Section 2889.5. (CTS, D.97-05-089.)

CPSD can find no case where PG&E's mental state was considered important when looking at a Rule 17 tariff violation (or any other tariff). In all cases found by CPSD that relate to Rule 17, the Commission strictly applied the language of the tariff. No such language regarding mental state exists in the tariff, and thus none should be considered.

The tariff provisions must be strictly applied, regardless of intent. In *Mendrin v. PG&E*, (D.89-02-059), the Commission found that the Complainant, Jack Mendrin, who is a farmer, admitted that he is not adept at reading tariffs. Mr. Mendrin filed a complaint for overcharges, because of agricultural rates that were allegedly improperly assessed. The Commission ruled against Mr. Mendrin, finding that PG&E's application of the tariff was technically correct. The Commission stated, however: "We can sympathize with complainants. Tariff provisions are technical and often complex." Yet, the Commission held that: "Tariff provisions must be strictly applied. They have the force of law, and must be assessed without discrimination. Ignorance of a party using a tariff cannot excuse the strict application of the rates by the utility." (*Mendrin v. PG&E*, D.89-02-059, 1989 Cal. PUC LEXIS 143, p.10.)

CPSD does not believe the tariff provisions of Rule 17.1 were technical or complex, but in any event, PG&E's inability to understand its tariffs is inexcusable. PG&E drafted the tariff itself. The Commission has stated: "We cannot excuse Pacific Bell for ongoing tariff violations on the basis that its managers could not understand the system which they were employed to operate." (*TURN v. Pacific Bell*, D.93-05-062, 49 CPUC 2d 299, 1993 Cal. PUC LEXIS 394, p.20.)

In summary, the evidence overwhelmingly demonstrates that PG&E's conduct violated the tariff. PG&E appears to argue that its belief as to whether it was in violation is relevant. While it may be relevant to the calculation of fine, it is not relevant to a finding that PG&E violated the tariff.

VI. RESTITUTION

Reimbursing customers for costs wrongfully imposed is the primary purpose for reparations. (*See* PU Code Section 734.) CPSD recommends that the Commission order PG&E to issue refunds (plus interest) to customers that were overcharged as a result of PG&E's illegal backbilling policy.

Section 734 provides, in relevant part:

> When complaint has been made to the commission concerning any rate for any . . . service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an unreasonable, excessive, or discriminatory amount therefor in violation of any of the provisions of this part, the commission may order that the public utility make due *reparation* to the complainant therefor, *with interest* from the date of collection if no discrimination will result from such reparation. (Emphasis added.)

The Commission set guidelines for imposing penalties in D.98-12-075. With regards to refunds, the Commission stated:

> Reparations are not fines and conceptually should not be included in setting the amount of a fine. Reparations are refunds of excessive or discriminatory amounts collected by a public utility. *Public Utilities Code § 734*. The purpose is to return funds to the victim which were unlawfully collected by

> the public utility. Accordingly, the statute requires that all reparation amounts are paid to the victims. Unclaimed reparations generally escheat to the state, *Code of Civil Procedure § 1519.5*, unless equitable or other authority directs otherwise, e.g., *Public Utilities Code § 394.9*. (D.98-12-075, p.53; 1998 Cal. PUC LEXIS 1016, *; 84 CPUC2d 155)

Many Commission cases discuss the appropriateness of refunds when a utility has violated the law. Recently, in D.04-09-062, the Commission ordered Cingular to pay refunds of money illegally obtained through Early Termination Fees, which were obtained as a result of a practice of a "no return" policy and material omissions to consumers, which the Commission found violated Public Utilities Code sections 451 and 2896. The Commission ordered Cingular to refund the ETFs, plus interest, to a broad group of consumers. The purpose was not only to make consumers whole, but in addition, the Commission found that "Reparation of ETF payments to customers who can be identified will help to make them whole and will limit Cingular's unjust enrichment from ETF receipts." (D.04-09-062, Finding of Fact 15.)

In the Assigned Commissioner's Ruling dated February 25th, 2005, the Commission put PG&E on notice that "If the investigation reveals that the conduct of PG&E violated the statutory laws or rules or orders of the Commission, it may levy fines and/or order PG&E to issue refunds."

The time period at issue was defined in the May 26th, 2005, Assigned Commissioner Ruling, which stated: "We will broaden the specified time period of this Investigation back to January 2000 consistent with the direction provided in Resolution G-3372."

A. Failure to Issue Bills

As discussed above, the Commission has found that PG&E's failure to issue bills constitutes "billing error" for purposes of Rule 17.1. CPSD's staff witness calculated the amount of money overcollected by PG&E as a result of a backbill sent after a period of failing to send a bill, for the time period 2000 to April 2005. The total amount comes to

$35,362,957, plus interest. (Ex.10, Revised Att.18.) The calculation and source data for this figure is summarized on Exhibit 10, which constitutes the latest revised figures based on up-to-date information obtained from PG&E (as of May 2006). PG&E's own calculation of the same category (residential delayed bills) was essentially the same, $36.7 million. (Ex.34, p.A2-3, Table A2-1.) For non-residential, CPSD calculated the total amount as of May 2006 is $693,751 (revised). (Ex.10, Revised Att.18.) The difference between CPSD's original calculation and CPSD's revised figures is that CPSD accepted PG&E's adjustment to remove amounts related to FERC-jurisdictional and special contract accounts, as explained in PG&E's testimony at page A2-3. CPSD recommends that PG&E be ordered to refund these amounts, plus interest.

Exhibit 10, Revised Attachment 18

Revised as of May 2006

Total $$ Amount of Residential Delayed Bills Issued > 3 Months							
Month	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**Totals**
January	203,062	594,700	492,797	138,599	1,221,048	134,113	2,784,319
February	319,992	524,168	352,503	128,832	1,452,017	95,292	2,872,803
March	526,905	1,001,197	387,927	268,056	1,175,827	456,052	3,815,964
April	544,857	798,779	372,799	442,083	959,445	172,755	3,290,718
May	531,013	1,063,208	333,271	342,791	800,178		3,070,461
June	453,079	778,311	297,240	743,313	907,358		3,179,301
July	285,262	636,011	224,852	893,049	1,077,742		3,116,915
August	259,497	657,448	151,813	1,507,702	1,324,640		3,901,099
September	218,113	562,532	192,539	1,144,341	970,147		3,087,671
October	267,783	499,499	131,905	887,855	289,692		2,076,734
November	436,303	497,162	34,081	972,240	133,605		2,073,391
December	442,623	386,979	214,384	821,499	228,096		2,093,581
Totals	**$4,488,489**	**$7,999,993**	**$3,186,110**	**$8,290,359**	**$10,539,794**	**$ 858,212**	**$35,362,957**

Source: PG&E Response 004-MDK Question #1 Attachment **CPSD_009-01-7** for periods
Jan00 – Nov02 (Legacy Period) and Attachment **CPSD_009-01-6** for periods
Dec02 to Apr05 (Cordaptiz Period)

1. Defining the Permissible Three Month Backbilling Period

The plain language of Tariff Rule 17(B)(2)(a) reads: "…PG&E may bill the Customer for the amount of the undercharge for a period of three months." However, PG&E reads the language as allowing 120 days (four months) – three months of backbilling, and then one month for the current bill. No precedent has considered this issue. CPSD believes that PG&E's interpretation is incorrect, and that the Commission should order PG&E to limit its backbills to "a period of three months" prior to the date of the backbill, which is the exact language of the tariff.

According to PG&E, as of July 15, 2005, PG&E changed its billing practice when calculating its backbilling limitations for estimated and delayed bills to its residential customers. (Ex.3, p.13.) For estimated bills, PG&E no longer includes the first bill based on an actual meter read when applying the three (3) month estimated backbilling limitation to its residential customers. (*Ibid*.) Similarly, when PG&E fails to send a bill, PG&E no longer counts the current billing period when applying the three (3) month backbilling limitation for its residential customers. (*Ibid*.)

CPSD believes the Commission intended that customers not be backbilled in excess of three months, which CPSD has calculated based on three billing periods (i.e., 95 days). For example, if PG&E sent a customer a backbill for 6 months on July 31st, the charges for the month of July would not be "undercharges", but the charges for the months of June and May would be. The charges for July would be current. The charges for the month of April would be over three months prior to the date of the backbill; however, under PG&E's definition, PG&E could bill for the month of April because it is within "120 days" prior to the backbill, or 4 billing cycles, one current and three for "undercharges". Essentially, PG&E reads the tariff as providing for three months of backbilling, no matter what. The plain language of the tariff limits backbills to three months. It has never been decided whether the tariff means "three months total" (PG&E's version), or "only the previous three months" (CPSD's version). It seems apparent that the Commission intended to limit backbilling to the "previous" three months, which may or may not include three months total. Thus, if PG&E did not discover a billing error until 6 months later, even if it was only a one-month error, it could not bill for the error. This seems more in line with the intent of the tariff and the *Skinner v. PG&E* case, in which the Commission limited the previous three months of undercharges to February, March, and April of 1993 (not January, and not any prior three month time period).

B. Reconnect Fees After Service Terminations Due to Unpaid Backbills

CPSD seeks refunds to those customers who faced additional financial harm because their PG&E service was terminated due to unpaid backbills. (Ex.3, p.18.) CPSD examined the issue of service terminations due to non-payment of a utility bill subsequent to receiving a delayed bill. Based on data provided by PG&E for the period January 2000 to April 2005, the annual number of residential and nonresidential customers who experienced service termination following the presentation of a long bill is presented in Table V-1 of CPSD's testimony, a total of 9,787. For the years 2000 to 2002, PG&E reported to CPSD that it could not provide customer data on the number of customers who received a long bill greater than 95 days, because the information was incomplete and not stored in their LCIS. (Ex.3, p.20.) However, for the years 2003 to 2005, CPSD was able to obtain accurate data. The data shows that 1,310 residential service terminations following the presentation of backbill greater than 95 days. (*Ibid*.) CPSD recommends that PG&E be ordered to refund the $5,500 ($120 non-res) collected by PG&E as reconnect fees after a termination for non-payment of a backbill, plus interest.

C. Deposit Requirements After Service Terminations

CPSD seeks refunds for customers who were charged a new or additional deposit after the presentation of an inappropriate backbill. (Ex.3, p.25.) According to PG&E, the implementation of CorDaptix caused an increase in the number of deposits requested. (*Ibid*.) From November 2002 to May 2003, PG&E had placed a moratorium on such credit and collections activity, but after May 2003, it resumed. As a result, the number of customers required to pay a deposit increased. (*Ibid*.) The number of deposits requested is 4,405 (Table VI-3, Ex.3), for a total of $288,789 (Table VI-4, Ex.3), which should be refunded to customers, plus interest.

D. Payment Arrangements Following a Large Backbill

CPSD does not seek a return of the financial impacts of the payments arrangements imposed by PG&E. In its Rebuttal Testimony, CPSD included examples of statements in complaints submitted to the Consumer Affairs Branch (CAB) where customers described the harm caused by the payment arrangements. CPSD believes it is appropriate to consider those impacts in considering the level of the financial penalty. It should be noted that PG&E threatened customers with termination for non-payment of backbills if customers did not accept the payment arrangements offered by PG&E, and that PG&E had no legal right to collect this money from these people. Some of the statements include (Ex.5, pp.6-10):

- **02-02-3742** – "Yeah you (PG&E) told me I can pay $351 a month for 13 months to pay it off since you forgot to charge me and put it on my bill for 13 months. I have five kids 13, 11, 10, 8, 6 and that was the lowest amount you gave me to pay. You guys wanted $450 a month. Now we don't have no PG&E at home in our apartment thanks to you very much for letting my kids & us suffering for you guys mistake."
- **04-04-5396** - PG&E failed to bill the customer for electricity from January 2003 to August 2004. "I live paycheck-to-paycheck, and I therefore carefully plan how I use my money. I explained that my electricity usage was based on what I was paying for in the next month's bill. In other words, if I knew that my bills were to be much higher, then I would have been especially determined to find ways to lower the bills, i.e., use less electricity. However, since PG&E had not billed me for almost two years, I had no way of knowing that the electricity bills were to be much higher."
- **01-04-2978** – Customer received a delayed bill covering a period of approximately 1 year. "Thanks to overextended credit cards we have been able to almost pay our tab in its entirety. However, we request some form of action or reciprocation. We feel as though PG&E has flagrantly abused its power to take advantage of those who are powerless to stop them."
- **01-01-7093** - Customer received a multiple month gas bill covering 4/28/00 to 12/28/00. "My father is on a fixed income and can not afford to pay this past due amount…. This is a tremendous hardship for my father."

- **04-01-2385** – Customer received a multiple month bill covering a period of approximately one year of gas service. “Now, I am 72 yrs. old trying to pay my bills and my Soc. Sec. is 471-mo. I clean a very few house to have any living money to live on…I believe it to be very unfair to a Senior-Citizen to hit them with almost one whole year’s worth of PG&E! I haven’t been able to buy groceries for a wk-because of having to get my rent together. How do I pay this.”
- **02-02-8911** – Customer did not receive a bill for 917 days. “I am on disability. I am not able to work. Please help me with this bill. I am at my wits end. I can’t take no more. I have no way, or means, to pay this bill. How could I do this when PG&E did not send me a bill for 917 days that almost 3 years.”
- **01-02-1275** – “I have not received an electric bill from you since August 2000. In late August, you did some work on my time of use meter. Since then there has been no bill. I’ve called your customer service number each month, September, October, and November, and received several reasons/excuses for your failure to bill me along with promises of action. As of this writing, there is still not bill.”
- **04-01-8956** – I moved into my apt. in June 2003 and my first bill was for $4.83 (approx.). I knew this had to be incorrect so I called and informed PG&E. The following month my bill was approx. $5. I once again called PG&E. This continued until January 2004 when I received a bill for over $1000. They finally figured out they were not reading the correct meter, even though I physically had gone out and read the meter number to the csr over the phone 2 months previously. I was being billed for the outside lights. I called 3 times to make payment arrangements and was assured my service would not be interrupted. One morning I woke up to find my service disconnected and when I called I was told that I failed to keep my payment arrangements which was not true. Apparently the payments were all being applied to the back bill so they said I was $50.00 past due on my current bill. I had to borrow $600 from my grandmother to have my

> service reconnected and I still have a balance of $426.36 which I really cannot afford to pay as I have been laid off. The payment arrangements they require is unreasonable, especially since this problem is all PG&E's fault."

E. Estimated Bills

CPSD obtained data from PG&E that showed the number of estimated residential bills sent for periods in excess of three months from 2000 through April 2005. (Ex.3, p.45, et seq.) PG&E provided corrected data prior to the hearings, which CPSD adopted. (Exhibit 15.) In response to data request CPSD 009-02, Supplement 2, (Exhibit 15) PG&E provide a correction that removed closing bills and duplicate bills from the calculation made by CPSD in its direct testimony. This reduced the numbers from 1,226,898 ($53,190,836.00) for the pre-CorDaptix LCIS period to 198,181 ($6,549,108.36). In Exhibit 15 (CPSD data request 009-02, Supplement 2), PG&E does not explain the reasons for the estimated bills. Exhibit 15 also shows 1,592 non-residential bills in the amount of $822,455 for the pre-CorDaptix LCIS period.

Post-CorDaptix implementation, Table X-2 shows the number of residential estimated bills sent in excess of three months to be 145,969 (51,270 without explanation). (Ex.3, Table X-2, p.47.) The amount totals $10,114,096 ($3,356,189 without explanation). Table X-3 of CPSD's testimony shows 9 non-residential estimated bills in excess of 3 years, for a total of $2,220. (Ex.3, p.47.)

Following its implementation of CorDaptix and prior to its change in estimated billing practices on January 13, 2005, PG&E issued, on average, 5,643 estimated bills per month to its residential customers. (*Id.*) Following its change in estimated billing practices on January 13, 2005, pursuant to Resolution G-3372, PG&E began applying the maximum three month backbilling limit for undercharges resulting from estimated bills to its residential customers and issued, on average, 719 estimated bills per month through April 2005. (*Id.*)

PG&E's implementation of CorDaptix in December 2002 decreased the number of estimated bills issued to its residential by an average of approximately 1.4% per month.

(*Id.*) PG&E's change in estimated billing practices on January 13, 2005 and following its conversion to CorDaptix resulted in an 87% decrease per month in the number of estimated bills issued in excess of three month to its residential customers through April 2005. (*Id.*) Despite a minimal decrease in the number of residential estimated bills issued following PG&E's implementation of CorDaptix, PG&E's temporary increase in delayed bills following its implementation of CorDaptix also led to the discovery that PG&E was violating D.86-06-035 and Tariff Rules 9 and 17.1 by estimating bills for periods in excess of three months for residential customers and three years for nonresidential customers. (*Id.*)

PG&E points out that Rule 17.1 "limits the backbilling of a customer for an undercharge to three months where the cause for estimation is within PG&E's control. The estimated bills when issued, however, were not backbills." (Ex.34. p.A2-14.) PG&E's point is that CPSD has counted estimated bills in its calculation of refunds.

While PG&E raises a valid point, the Commission has expressed concern that utilities make strong efforts to provide timely, accurate bills, and to detect any unauthorized usage or meter error through effective measures. In D.86-06-035, the Commission stated:

> As a matter of law, fairness, and customer relations, however, the utility should be careful in establishing that meter error or meter tampering has occurred and in estimating the amount of energy that was not registered and billed. This is particularly true in the case of meter error, where the customer may be unaware of the meter's malfunction and may suddenly be confronted with a large backbill. The meter, after all, is owned, maintained, and, in most cases, read by the utility, and the utility accordingly bears the responsibility for promptly detecting and repairing faulty meters." (Pp. 2-3.)

Decision 86-06-035 goes on to state:

> We expect the management of the utilities to use the various available measures to reduce the amount of unmetered energy. This reduction should accrue to the benefit of ratepayers in the form of a lower rate for uncollectibles and

> lower amounts of unaccounted-for energy. We expect the portion of the uncollectible rate and unaccounted-for energy attributable to unauthorized use, meter error, and billing error to show a decrease, and we will give close scrutiny to these items in the general rate cases to monitor the utilities' progress in minimizing these losses.
>
> We feel strongly about the utilities' duty to implement comprehensive meter inspection and energy theft reduction programs. If we do not feel that sufficient progress has been made in this area by each utility at the time of its next general rate case, we will consider developing a mechanism through which shareholders may be placed at risk for a portion of the revenue requirement attributable to losses from energy theft.

In Resolution G-3372, as modified by D.05-09-046, the Commission states: "[I]t would be improper to rely on the phrase "unusual conditions" in Rule 9C to justify estimating bills indefinitely when billing error occurred. In such cases PG&E should apply Rule 17.1." (D.05-09-046, Appendix A: Modified Resolution G-3372, p. 10.)

In D.86-06-035, Appendix A, the Commission decided to hold PG&E responsible for nonregistering meters, saying:

> 3. Nonregistering Meter. If a meter is found to be nonregistering, the utility may bill the customer for the utility's estimate of the electric/gas service used but not registered, not exceeding three months in the case of residential service and three years for nonresidential service.

This tariff change in D.86-06-035 shows an intent to limit estimated bills to three months where the billing error is due to the malfunction of PG&E's equipment. By analogy, PG&E is also responsible for its billing system, just as it is responsible for providing working meters. In D.86-06-035 the Commission was not presented with the issue of billing errors caused by a billing system, but nevertheless the intent is the same, to hold PG&E responsible for equipment errors that are within its control.

CPSD believes it is a violation of Commission policy and PG&E's tariffs for PG&E to send estimated bills indefinitely. Moreover, it places the customers at risk of a large backbill, and deprives the company of revenue. It is clearly not a good business practice to allow PG&E to estimate bills for a long period of time.

If PG&E has not sufficiently addressed issues of meter error or meter tampering, the Commission has stated that it will consider "developing a mechanism through which shareholders may be placed at risk…" PG&E's failure to adequately implement the new billing system was the main cause of the large number of incorrect bills. Therefore, it is appropriate for the Commission to use its discretion to order refunds of the estimated bills in excess of three months, as recommended by CPSD. This is consistent with Resolution G-3372, which states that Rule 17.1 should be applied to estimated bills when billing error occurs.

Alternatively, the Commission could consider ordering PG&E to modify its tariffs so that, when an estimated bill is sent by PG&E due to billing error, PG&E must detect the error in a timely fashion. PG&E should not be permitted to issue estimated bills indefinitely because of billing system errors as happened in this case.

CPSD concedes that Rule 17.1(B)(2)(a) refers to "undercharges." There is no question that PG&E should refund the amount of undercharges on estimated bills that PG&E backbilled for periods exceeding three months. In addition, CPSD believes the fact that PG&E sent backbills to true-up estimated bills was a violation of its tariff and should subject PG&E to fines and penalties.

F. The Caselaw Indicates Refunds Are an Appropriate Remedy

A review of the applicable Commission precedent indicates that refunds are appropriate for overcollections in violation of a tariff.

As discussed above, the case most directly on point is *Skinner v. PG&E*, D.94-07-050. Although the Commission did not directly find that PG&E had violated the tariff, it clearly stated that PG&E could only backbill for a period of three months, and that PG&E had to credit (or not bill) the Skinners for the additional nine months contained in the 12-month backbill originally presented to them. Thus, presenting a backbill for a period of greater than three months is clearly in violation of the tariff, and the appropriate remedy is that PG&E should either not bill for that period, or issue a refund in the event that PG&E collects the overcharges beyond three months.

In *Mad River Community Hospital v. PG&E*, (D.00-11-011), the Commission found that PG&E had violated Tariff Rule 17.2, and ordered PG&E to cancel the overbilling to the hospital for energy consumption in the amount of $76,668.48, including $4,000 deposit. This case stands for the proposition that, where PG&E has overbilled a customer in violation of a tariff, a refund (or cancellation) of the overbill is appropriate.

In *CTC Food International, Inc. v. PG&E*, (D.92-10-004), the complainant was a customer of PG&E that believed the gas bill from PG&E was much too high based on previous bills, and requested several times that PG&E send an inspector to investigate. PG&E's inspector failed to find the gas leak because he failed to follow PG&E's internal procedures to test the reliability and accuracy of the meter, test the meter for gas leaks, verify the meter reading, and review the customer's load and capacity to ensure that the customer's system had the ability to use the billed quantity of gas. The Commission found that "The delay in discovery of the gas leak caused CTC to pay $30,883.53 more in gas bills than it would have paid had PG&E followed its procedures and consequently helped in earlier detection of the leak." The Commission ordered PG&E to refund $39,883.53 in overcharges for gas service, stating: "Without a financial penalty, there is little incentive for the utility to follow its procedures. To increase PG&E's incentive, it should not be allowed to recover this loss from other ratepayers."

1. Interest

According to Public Utilities Code Section 734, quoted above, the Commission "…may order that the public utility make due reparation to the complainant …, *with interest* from the date of collection if no discrimination will result from such reparation." (Emphasis added.) Interest is calculated at the three-month commercial paper interest rate.[14] PU Code Section 734 does not require the Commission to grant interest when

[14] Use of the three-month commercial paper interest rate to calculate interest on refunds to ratepayers is consistent with established Commission ratemaking practices. (D.05-09-007, Finding of Fact 9.)

reparations are ordered; the provisions of Section 734 are not mandatory. *Zacky Farms v. PG&E*, (D.93-11-064.) However, the Commission has ordered payment of interest on a refund in order to prevent a utility from obtaining a "windfall" from the "time value of what amounts to an involuntary loan to the utility." (D.87-03-056.)

In *The Mark Hopkins Intercontinental Hotel v. PG&E*, (D.87-03-056), the Commission considered the hotel's request for interest from PG&E, based on PG&E's admitted $601,788.85 overcharge for electrical service. PG&E refused to pay interest, but the Commission sided with the hotel, finding that: "1. There is no economic policy which would justify denying complainant compensation for the time value of money collected by PG&E by *mistake*. 2. There is no equitable reason for denying complainant compensation for the time value of money held by PG&E by *error*." (Emphasis added.)

In *The Woods, et al., v. PG&E*, (D. 90-03-035) the Commission stated: "We have ordered interest to be applied in cases where the utility *clearly erred* and the complainant was not a contributor to the error. For example, in Decision (D.) 87-03-056 we ordered PG&E to pay interest on the refund to complainant The Mark Hopkins Intercontinental Hotel (Mark Hopkins). In that case PG&E had left both an old and a new electric meter recording electric usage." (Emphasis added.)

In *Zacky Farms v. PG&E*, (D.93-11-064), Zacky Farms ultimately obtained $433,000 in refunds from PG&E, representing the difference between bills paid at commercial rates and bills that should have been paid at agricultural rates. Zacky then sought reparations of $42,024, representing interest on the amount previously refunded. Although the Commission did not order interest, the Commission summarized and analyzed the facts according to a much older case, *White v. So. Cal. Edison*, (1962) 59 CPUC 740, stating: "Edison's interpretation of its clear and unambiguous tariff rule was unsound and unreasonable and could have led to discrimination among its customers. Thus, Edison "clearly erred" or was "derelict in its duties"; and the order requiring interest in that case was consistent with the results reached in recent decisions."

There is no question that in the facts of this case, PG&E has "clearly erred" in its interpretation of Tariff Rule 17.1(B)(2)(a), by mis-interpreting the phrase "billing error."

The Commission has already found, in Resolution G-3372, that PG&E's mistaken interpretation was unreasonable. In *Zacky Farms*, by contrast, the Commission noted that the facts were different because the Commission did not find that PG&E had violated any tariffs, and that in *White v. So. Cal. Edison*, Edison did not have to contend with "extremely confusing rate application facts and issues that confronted PG&E in both the Harris Farms case and in the instant case." Thus, where the facts are not confusing and it is clear that there is a violation, the Commission will order interest on refunds.

In the *TURN v. Pacific Bell* case, the Commission ordered that a restitution fund be created (at no cost to ratepayers), which would fund the payment of refunds, at a 12% annual rate of interest. In addition, the Commission ordered Pacific Bell to pay a 12% rate of interest on any future refunds paid to customers covered under that decision. The Commission's rationale for interest was as follows: "Pacific argues that it did not add interest to refunds for improper charges because its tariffs do not provide for interest. We have found that interest shall be paid where the utility has had the use of complainant's money, consistent with PU Code Section 734 which provides that reparations shall be paid with interest (*Wright's Stationers v. Pacific Bell* (1990) 37 CPUC2d 464)." (*TURN v. Pacific Bell*, D.93-05-062, 49 CPUC 2d 299, 1993 Cal. PUC LEXIS 394, p.41.)

In this case, PG&E "clearly erred"; it made a "mistake" and committed "error" when it overbilled customers in violation of the three month limit on backbilling. Commission policy as described in the caselaw above dictates that PG&E should not obtain a windfall from the improper collection and use of money that belonged to its customers. In order to make customers whole, PG&E should be ordered to return money collected by PG&E in error, plus interest (the time value of the money).

G. Tariff Rule 9 Should be Modified To Use A More Streamlined Approach In The Calculation Of The Customer's Average Daily Usage (ADU) To Determine Usage In An Estimated Bill

CPSD reviewed PG&E's testimony regarding its estimation methodologies of consumer bills and finds areas of agreement and disagreement. (Ex.5, p.19 et seq.) PG&E objects to CPSD's recommendation that PG&E use more specificity in its methodology for estimating bills, and objects to CPSD's recommendation that bills should be recalculated. PG&E's testimony also states how it follows its own estimation methodology in calculating customer bills and that it correctly calculates baseline quantities and rates in estimating bills. CPSD agrees that PG&E does follow its own estimation methodology in calculating customer bills and generally uses the correct baseline quantities and rates in estimating bills. However, CPSD continues to recommend that Tariff Rule 9 contain specific language of a more streamlined approach to calculating estimated bills.

PG&E's estimation methodology is complex and potentially confusing to customers trying to understand their estimated bill. (*Ibid.*) In addition, the complexity of PG&E's billing methods create unnecessary calculations that are not always favorable to the consumer. (*Ibid.*) A more specific, streamlined estimation method defined in the tariff will result in estimates that are more closely based on a customer's actual energy consumption, and are easier for a customer to understand. (*Ibid.*)

VII. PENALTIES

The purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others. (D.98-12-075.) For this reason, fines are paid to the State of California, rather than to victims. (*Id.*) Effective deterrence creates an incentive for public utilities to avoid violations. (*Id.*) Deterrence is particularly important against violations which could result in public harm, and particularly against those where severe consequences could result. (*Id.*) To capture these ideas, the two general factors used by the Commission in setting fines are: (1) severity of the offense and (2) conduct of the utility. (*Id.*) These help guide the Commission in setting fines which are proportionate to the violation. (*Id.*) Severity of the Offense

1. Number of Violations

The number of the violations is a factor in determining the severity. (D.98-12-075.) A series of temporally distinct violations can suggest an on-going compliance deficiency which the public utility should have addressed after the first instance. (*Ibid*.) Similarly, a widespread violation which affects a large number of consumers is a more severe offense than one which is limited in scope. For a "continuing offense," Public Utilities Code Section 2108 counts each day as a separate offense. (*Ibid*.)

Here, the number of violations is very large. PU Code Section 2107 provides that each violation is a separate and distinct offense. It can be argued that each bill sent to a customer that violates the tariff is a separate and distinct offense, punishable under Section 2107. PG&E sent hundreds of thousands of delayed and estimated bills, a widespread pattern that affected thousands of customers spanning a five-year time period. It is clear from the record that PG&E mis-interpreted its tariff from the 1986 *Retroactive Billing Decision* onward. (Ex.3, p.75.) The large number of violations makes it a more severe offense, and calls for a larger penalty. The exact number of violations is described in CPSD's testimony (Exhibit 9 shows that 315,950 residential delayed bills were sent in violation of the tariff[15]). CPSD also believes each bill for an undercharge following an estimated bill over three months is a violation of the tariff. Between 2000 and 2002, PG&E sent for the pre-CorDaptix LCIS period 198,181 estimated bills, and post-CorDaptix (2002-05) 51,270 estimated bills without explanation.

There are many cases that demonstrate that for large numbers of violations, the Commission typically imposes a large fine. For example, in *Vista Group International, Inc.* (D.01-09-017), the Commission found 7,000 violations and imposed a $7 million fine; in the *Qwest* case, (D.02-10-059), the Commission found 8,454 violations and imposed a fine of approximately $20 million; in its investigation into *Southern California Edison Company's Electric Line Construction, Operation, and Maintenance Practices,* (D.04-04-065), the Commission imposed a fine of $656,000, ($20,000 for each of the

[15] It became apparent during the hearings that the number of bills did not correspond exactly with the number of customers affected, since one customer may have received one envelope with two backbills, one for gas usage and one for electric usage. Some customers may have had a service arrangement with PG&E for only gas or only electric, and in that case there would be a one-to-one correspondence between a backbill and customer. In any event, CPSD believes each bill in violation of the tariff is a separate and distinct offense.

30 GO 95 and 128 violations involving personal injury or property damage, and $1,000 for each of the 56 violations of GO 165 for failure to identify unsafe conditions).

Specifically, the Commission has imposed substantial fines for widespread tariff violations. In *TURN v. Pacific Bell*, (D.93-05-062), the Commission found a pattern of systematic overcharges assessed contrary to tariff provisions, which violated the tariffs and PU Code Section 532. The Commission did not find the exact number of violations, but it found that Pacific Bell collected over $50 million annually in late fees ($250 million over the 5 years examined in that case). Thus, the Commission ordered Pacific Bell to pay a penalty of $15 million, and to create a restitution fund of $34 million.

In *TURN v. Pacific Bell*, the Commission stated the following, which is applicable to this case: "In general, Pacific's witnesses leave the impression that they believe the subject payment processing problems and tariff violations are minor concerns. Pacific defends itself against this complaint by arguing that tariff violations were simply the result of management ignorance and a complex operation. These, however, are not defenses. They are admissions of considerable mismanagement."

2. Economic Harm

Economic harm reflects the amount of expense which was imposed upon the victims as well as any unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in establishing the fine. (D.98-12-075.)

PG&E's customers suffered greatly. They had to pay large backbills that they did not owe. They faced disconnect notices. They faced collections activities. They had no choice but to enter harsh payment arrangements to prevent disconnection. As described above and in CPSD Rebuttal Testimony (Ex.5), customers suffered stress, frustration, and financial hardship. PG&E grudgingly admits a few customers may have been harmed, but not the majority.

In *TURN v. Pacific Bell*, the Commission stated that Pacific Bell's payment processing delays caused substantial financial harm. Customers were assessed late payment fees they did not owe; Pacific Bell issued disconnect notices if the customer did not pay; to avoid disconnection, customers had to pay the bill again, resulting in a double charge; customers had to pay reconnect fees; and customers who received disconnect notices were treated as financial risks, and given shorter payment periods. (*TURN v. Pacific Bell*, D.93-05-062, 49 CPUC 2d 299, 1993 Cal. PUC LEXIS 394, pp.8-9.) The Commission determined that Pacific Bell's practices caused customers substantial financial harm.

The threat of disconnection alone is one that causes serious harm, if not financial, because of the threat to health and safety. The U.S. Supreme Court has stated that: "Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety." (*Memphis Light, Gas & Water Division v. Craft* **(**1978) 436 U.S. 1, p.18.) The Supreme Court also stated: "Quite apart from its duty as a public service company, a utility -- in its own business interests -- may be expected to make all reasonable efforts to minimize billing errors and the resulting customer dissatisfaction and possible injury." (*Id*. at 18.) And further: "Although utility service may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation." (*Id*. at 20.) PG&E's conduct demonstrates a callous disregard for its customers, by threatening them with disconnection from essential services in order to obtain payment of illegal backbills that many, if not most, customers could not afford to pay.

B. Conduct of the Utility

1. Utilities' Actions to Prevent, Detect, and Disclose Violations

Prior to a violation occurring, prudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. This includes becoming familiar with applicable laws and regulations, and most critically, the utility regularly reviewing its own operations to ensure full compliance. (D.98-12-075.)

The Commission expects public utilities to monitor diligently their activities. (*Ibid*.) Where utilities have for whatever reason failed to meet this standard, the Commission will continue to hold the utility responsible for its actions. (*Ibid*.) The Commission will also look at the management's conduct during the period in which the violation occurred to ascertain particularly the level and extent of involvement in or tolerance of the offense by management personnel. (*Ibid*.)

Prompt reporting of violations furthers the public interest by allowing for expeditious correction. (*Ibid*.) For this reason, steps taken by a public utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty. (*Ibid*.)

PG&E conduct was below-standard in several respects. PG&E essentially ignored the Commission's guidance in the *Skinner v. PG&E* case. PG&E claims it took a narrow view of that case, and did not consider the "failure to send a bill" to be covered by *Skinner*. PG&E gave the tariff an entirely narrow and unreasonable meaning, to the financial detriment of its customers. Despite complaints from its customers, PG&E ignored Rule 17.1 and instead quoted from Rule 9, erroneously telling its customers that Rule 9 required PG&E to collect money for all usage. This was obviously in violation of Rule 17.1, yet PG&E never considered Rule 17.1 to be applicable.

Moreover, after Executive Director Larson requested that PG&E stop collecting from residential customers overdue amounts that dated back more than 90 days and referred to Rule 17.1, PG&E changed its current practices, but did not begin issuing refunds to customers for past violations.

Although PG&E had placed a moratorium on collection activities in order to protect customers, it lifted the moratorium in early 2003. (Ex.34, 8-4.) The moratorium only protected customers from November 2002 to February 2003. (*Ibid*.) After that, the number of terminations increased dramatically, because PG&E was "working through the backlog of customers who were previously eligible for collections activity, but who were immunized from such activity during PG&E's moratorium." (*Id*., at 8-2.) In other words, PG&E proceeded with collections activities against those who had been protected by the moratorium, which defeated the purpose of the moratorium, which was to protect customers from the inevitable errors in billing that were forecasted with the CorDaptix rollout in December 2002.

PG&E also ignored the complaints from its customers. (See Ex.3, Chapter IX, CAB Consumer Complaints.) The complaints should have alerted PG&E to the problems with tariff interpretations and the potential for customer harm as a result, but PG&E instead dismissed the complaints using an improper interpretation of an inapplicable tariff, claiming that under Rule 9 PG&E was required to bill for all usage, regardless of time limits. (Ex.4, Att.32 – customer declarations and attached correspondence.)

CPSD concedes that PG&E has since changed its billing practices, but points out that the changes only occurred after the Commission took action. At no time has PG&E acknowledged its wrongdoing and offered to return its ill-gotten gains. While PG&E claims that "PG&E protected its customers against harm" (Ex.34, 2-4), in fact, PG&E caused its customers grief, stress and financial harm, and in effect protected its shareholders from financial harm at the expense of its customers.

2. Reliance on CAB's "Closure Letters" to Customers

In D.05-09-046, the Commission made it clear that PG&E cannot reasonably rely on the agreement of CAB consumer representatives, stating: "We, and not the staff, establish the regulatory law that the utilities must follow. The CAB letters do not constitute grounds for finding the Resolution to be unlawful or erroneous, nor does PG&E offer legal authority in support of its argument on this point. PG&E knows very well that the informal opinions of the Staff cannot bind the Commission. PG&E's discussion of CAB letters does not identify error in the Resolution."

Moreover, PG&E cannot demonstrate that its management in fact relied upon the advice of CAB in its interpretation of Rule 17.1(B)(2)(a). The letters from CAB indicate that CAB staff was merely repeating PG&E's staff findings with regards to the customer's complaint. (Ex.4, Att.32.)

C. Financial Resources of the Utility

PG&E is a large company with vast financial resources. The Commission has found that PG&E's top executives' bonuses exceeded $80 million for 2004-05. (D.04-05-055, 2004 Cal. PUC LEXIS 254, *15.) A small or insignificant penalty will not deter

PG&E from future tariff violations, and would have little impact on the conduct of its executives.

D. The Role of Precedent

As discussed above, PG&E should have learned a lesson from the *Skinner v. PG&E* case, a case that clearly put PG&E on notice that it was not allowed to collect undercharges over 3 months. However, PG&E changed nothing after the *Skinner* case. PG&E repeatedly quoted Rule 9 to its customers to justify backbills. (Ex.3, p.58; Ex.4, Att.43.)

E. PG&E Ratepayers Should Not Be Charged for Refunds Ordered by the Commission as a Result of a Tariff Violation

PG&E's testimony comes to the unusual conclusion that, if the Commission orders PG&E to refund money to customers, PG&E's ratepayers should be required to pay for it. (Ex.34, 9-15.) This is unusual for the simple reason that PG&E confuses "normal ratemaking" with an enforcement proceeding. This case is not a "normal ratemaking" case – in fact, it was specifically separated from the GRC and placed into a separate docket, I.03-01-012. There are no cases (that CPSD could find) where the Commission ordered penalties associated with a violation to be paid by ratepayers – common sense would prohibit even making the argument. If ratepayers paid the refund, then the penalty essentially would be felt by them, not PG&E's shareholders and management. But ratepayers are not responsible for the tariff violations and have no control over PG&E's management decision to interpret the tariffs the way that they did. Moreover, if PG&E is allowed to recover the costs of the refunds from ratepayers, then PG&E will suffer no harm whatsoever, which makes no sense in light of the fact that PG&E's management are solely responsible for the violations.

It is also important to point out that, *for the sake of argument*, had PG&E not collected overcharges greater than three months, it is not clear that "normal ratemaking" would allow PG&E to recover the costs of the undercollection from ratepayers. TURN's witness Mr. Florio argued that the Commission did not anticipate that balancing accounts would be the mechanism through which revenue shortfalls resulting from "billing error" would be necessarily be recovered. (Ex.24.) The record is clear that no balancing accounts were created for revenue shortfalls resulting from "billing error", nor should there have been. Mr. Florio states: "Utility losses that result from billing errors not being corrected within the allowed time frame for backbilling should be recorded as uncollectibles, not as routine shortfalls in revenue balancing accounts." (Ex.24, p.7.)

Finally, the caselaw does not support a finding that ratepayers should pay for penalties. None of the cases cited by PG&E's witness McManus affirmatively support her position that ratepayers should pay for the refunds. The applicable caselaw indicates the opposite – that shareholders always pay for penalties, whether those penalties take the form of refunds, interest, or monetary fines. In *TURN v. Pacific Bell*, the Commission stated: "To help assure that we will not revisit customer service problems again, we today impose a $15 million penalty on Pacific. We do so with the belief that the penalty will send a message to shareholders and management that we expect Pacific to provide the highest quality service in accordance with its tariffs and consistent with its obligation to serve the people of the state." The Commission also ordered Pacific Bell to create a $34 million fund to pay outstanding refunds.

In *CTC Food International, Inc. v. PG&E*, (D.92-10-004), PG&E's inspector failed to find the gas leak at complainant's premises because he failed to follow PG&E's internal procedures. The Commission stated: "Without a financial penalty, there is little incentive for the utility to follow its procedures. To increase PG&E's incentive, it should not be allowed to recover this loss from other ratepayers." The caselaw clearly supports that payment of refunds as a result of a tariff violation amounts to a penalty, and penalties are always borne by the shareholders. To find otherwise would defeat the purpose of having penalties.

F. Recommendation

Therefore, CPSD recommends a fine in the amount of $6.75 million. CPSD calculated the recommended fine amount by multiplying $1,000 per day by the number of days PG&E maintained an illegal backbilling policy since the year 1986 (approximately

6,750 days) when D.86-06-35 was adopted. CPSD does not recommend calculating the fine on a per-violation basis, because that would result in an amount that is excessively high.

Typically, where it was appropriate, the Commission has calculated the fine on a per-day basis. For example, in *Coral Communications*, (D.01-04-035), the Commission imposed a fine of $5.1 million (510 days by $5,000 per day); in *USP&C*, (D.01-04-036), the Commission imposed a fine of $1.75 million (350 days by $5,000 per day); in *Pacific Fiber Link*, (D.02-08-063), the Commission imposed a fine of $378,000 (216 days by $1,750 per day). CPSD believes the amount is substantial enough to accomplish the goals of deterrence and punishment for PG&E's behavior, which was widespread, occurred for a long period of time in direct conflict with a prior case (*Skinner v. PG&E*), and caused substantial economic harm.

VIII. CONCLUSION

For the reasons stated above, CPSD believes that refunds and substantial fines are warranted.

Respectfully submitted,

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July 7, 2005

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of "**OPENING BRIEF OF THE CONSUMER PROTECTION AND SAFETY DIVISION REGARDING PG&E'S BILLING AND COLLECTION PRACTICES**" in **A.02-11-017 et al.** by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

[X] **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on July 7, 2006 at San Francisco, California.

/s/ MARTHA PEREZ
Martha Perez

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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